United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

No. 74-1361

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P/S

In the

United States Court of Appeals

For the Second Circuit

ALLSTATE INSURANCE COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION TO REVIEW AND SET ASIDE A DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

BRIEF OF ALLSTATE INSURANCE COMPANY

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Decision of the National Labor Relations Board finding a violation of Section 8(a)(3) of the National Labor Relations Act[1] was internally inconsistent and constituted error as a matter of law for failing to conclude, or even consider, that the evidentiary factors which caused the Board to dismiss the alleged violation of Section

1. 29 U. S. C. § 151 *et seq.*, hereinafter referred to as "the Act".

8(a)(3) were precisely the same factors that infected the findings of a violation of Section 8(a)(1)?

II. Whether a Decision of the National Labor Relations Board which utterly fails to articulate reasons for its order, in contravention to the Administrative Procedure Act, precluding meaningful review, may be judicially enforced?

III. Whether substantial evidence on the record as a whole supports the Board's findings that the Company violated Section 8(a)(1) of the Act.

STATEMENT OF JURISDICTION

Allstate Insurance Company (hereinafter "the Company") pursuant to Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C., Sec. 151, *et seq.),* seeks review of a Decision and Order of the National Labor Relations Board, issued on March 12, 1974, and reported at 209 NLRB No. 68 (J. A. 57-72).[2] That decision by Chairman Edward B. Miller and Member Howard Jenkins, Jr., with Member Ralph E. Kennedy concurring in part and dissenting in part, reversed the Section 8(a)(3) findings and affirmed the Section 8(a)(1) findings of the intermediate Decision of Administrative Law Judge, Jennie M. Sarrica, reported at JD-458-73 (J. A. 18-40).

This Court has jurisdiction of the proceedings as the unfair labor practices alleged to have been committed occurred in Long Island, New York, within this judicial circuit and the Company maintains offices and transacts business within this circuit.

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2. "J. A." references are to the portions of the record reproduced in the joint appendix. "Tr." references are to the original transcript lodged with the Court. "R. X." and "G. C. X." references are to the exhibits introduced by the Company and General Counsel, respectively.

STATEMENT OF THE CASE

A. The Nature of the Case

On November 6, 1972, the Union filed a charge with the Board principally attacking the Company's August 28, 1972 discharge of employee Edgar Hansen, allegedly for anti-union motives and, claiming that the Company engaged in several violations of Section 8(a)(1) of the Act, each one solely alleged to have been committed against Edgar Hansen, the supposed 8(a)(3) discriminatee. Thereafter, on January 15, 1973 complaint issued (J. A. 3-7) and was amended on February 23, 1973 (J. A. 13-14). Issues were by the Company's answer to the complaint, as amended (J. A. 15-16) and the matter was thereafter heard by an Administrative Law Judge who found the Company, by its supervisors, had committed violations of Section 8(a)(1) by making statements to Hansen which amounted to coercive interrogations regarding his union activities, threats of discharge or other reprisals for joining or assisting the Union, and creating an impression that Union meetings and activities were kept under surveillance; and that the Company had discriminatorily discharged employee Hansen for engaging in union activity in violation of Section 8(a)(3) and (1) of the Act (J. A. 18-40).

The Company filed exceptions to the Law Judge's Decision (J. A. 41-57) which alleged the following fundamental defects in the Law Judge's findings:

> (1) the Law Judge miserably failed to properly analyze and write a decision which comports with even the bare fundamentals of good judicial administrative report writing under the Administrative Procedure Act, 5 U. S. C. § 557 *et seq.*, thereby making it impossible for a reviewing Board or court to do its job.

(2) the Administrative Law Judge consistently throughout her decision: resorted to use of generalized blanket findings relating to credibility; failed to indicate carefully and specifically how she arrived at her credibility conclusions; and, irrationally, chose to believe the alleged discriminatee's uncorroborated testimony on all critical points, though Hansen proved himself to be incredible, inconsistent, a fantasizer of fact and of generally suspect veracity compared to the Company's 12 witnesses who testified forthrightly (contrary to Hansen's testimony), were mutually corroborative and demonstrated their candor at the hearing, all of which was condemned by the Board and Courts as a bad practice and constitutes a sufficient basis for rejecting her conclusions as to credibility and warranting a reversal of her findings and conclusions on the issues in the case.

(3) the Law Judge abjectly failed to consider the record evidence as a whole, and, on the basis of carefully selected bits and pieces of evidence and patently disregarding whole bodies of evidence directly contrary thereto, the Law Judge found violations of 8(a)(1) and 8(a)(3) of the Act, in direct contravention to the Supreme Court's proclamation (*Universal Camera Corporation* v. *N. L. R. B.*, 340 U. S. 474, 496 (1951)), that "substantiality of the evidence must take into account whatever in the record fairly detracts from its weight."

On review, the Board reversed the Law Judge's findings and conclusions that the discharge of Hansen violated Section 8(a)(1) and (3) of the Act and therefore dismissed entirely the 8(a)(3) portion of the complaint. The Board, in its majority opinion (hereinafter referred to as the "Board Decision") rebuked the Law Judge for picking and choosing only selected bits of evidence in the record and by failing to consider and discuss in her Decision all of the relevant evidence to support her conclusions, thus, mandating a rare *de novo* "reweighing of the [record] evidence" by the Board (J. A. 61). The Board majority carefully considered the entire record with

respect to the 8(a)(3) allegation (J. A. 58-64) and reversed the Law Judge's crediting of Hansen over Company witnesses, concluding that Hansen's testimony was "confused and inconclusive" (J. A. 61) and "of dubious weight" (J. A. 62) compared with Company witnesses' "unequivocal" and "clear and consistent testimony." The Board found that Hansen had, indeed, "acted with probable deceipt, and surely less than total honesty and candor in pursuing his claim . . . which reasonably led Respondent to doubt [Hansen's] integrity" and caused his discharge (J. A. 63, 64).

Nonetheless, and in spite of Hansen's demonstrated lack of candor, which the Board recognized in its § 8(a)(3) analysis, the Board majority summarily affirmed the Law Judge's findings of 8(a)(1) violations without any similar analysis, merely attaching "great weight" to the credibility findings of the Law Judge (J. A. 58).

Contrary to the other two Board Members constituting a majority, Member Kennedy in a sharp dissent discredited Hansen's testimony completely and, decided he would dismiss the Complaint in its entirety (J. A. 66). Member Kennedy demonstrated the internal inconsistency in the Board's Decision—that each of the findings of violation of Section 8(a)(1) depends solely upon: (1) fully crediting the word of Hansen whose testimony was so thoroughly disregarded by the Board on the Section 8(a)(3) allegations even though Hansen's 8(a)(1) testimony contained the same kinds and quality of contradictions, inconsistencies and evasive tactics found in his 8(a)(3) testimony and, (2) the disregard of whole bodies of evidence contrary to Hansen's testimony, which omission the Board found to be critical in its 8(a)(3) analysis.

The Company was ordered by the Board majority to cease and desist from engaging in the Section 8(a)(1) activity found to be unlawful and to post notices to its employees (J. A. 65).

This appeal is based on the assertion that the Board majority's Decision finding violations of Section 8(a)(1) is internally

inconsistent to its dismissal of the entire Section 8(a)(3) allegations moreover, is contrary to basic tenets of administrative procedure, in any event, not supported by substantial evidence on the record considered as a whole.

B. Background Summary of the Facts

Although the instant petition attacks the Board's findings and conclusions only with respect to the § 8(a)(1) findings, it is necessary to examine the essence of the § 8(a)(3) testimony which constituted a large part of the hearing, to point out the internal inconsistency of the Decision.

1. The Discharge of Edgar Hansen

On September 30, 1971 Edgar Hansen, a claims adjuster employed by Allstate at its Baldwin, New York office approached Caren Cramer, a property examiner employed by Allstate at that office to put in a claim[3] for a lost or stolen fur coat which Hansen had recently purchased for $844.82 (J. A. 140). Hansen described the coat as a "full length mink coat" for which he said "he paid $1,800.00" (J. A. 141).[4] Hansen falsely asserted, as the Board found, that he gave Cramer "all the details" (Tr. 84) but did not tell her he paid $1,800.00 for the coat or that it was a long coat (J. A. 62). Shortly thereafter, Cramer telephoned an independent fur investigator, Arthur Schachner. Hansen picked up the telephone and again told Schachner that he "paid $1,800.00 for the coat . . . that is what I paid and that is what [it was] appraised at." (J. A. 145.) Hansen repeated to Schachner what he had told Cramer,

3. Hansen had secured an Allstate insurance policy covering his wife's fur coat (J. A. 140).

4. All of which later proved to be a lie. Thus, Hansen paid $844.82 for the fur coat and it was a short coat. Hansen had charged a portion of the price of the coat on his department store credit account which was later discovered in subrogation proceedings (J. A. 205-207; 335; R. X. 5).

that the garment was "full length" and that he had no bills nor receipts (J. A. 145, 147; Tr. 393). Schachner investigated the claim and drafted his report (J. A. 146-147; 331; G. C. X. 22) based, in large part, upon Hansen's misrepresentations, recommending settlement of the coat claim for $1,370.00 (J. A. 147). Hansen's testimony regarding this conversation was incredible.[5] The Board, noting that the Law Judge's Decision completely "fail[ed] to reflect any of the representations Hansen made to Schachner about the coat" and utterly omitted Schachner's testimony from her Decision, weighed Schachner's testimony against Hansen's and found Hansen's testimony wanting in view of his evasive and incredible testimony. But these same types of inaccurate statements by Hansen (and critical omissions of contrary evidence from the Law Judge's Decision) are inconsistently relied upon by the Board to sustain its Section 8(a)(1) findings.

On October 19, 1971, Belger, the Baldwin office manager, met with Hansen and Kane (Cramer's supervisor) and Hicks, a supervisor in the Baldwin office, in Belger's office. At that meeting, Hansen, as found by the Board, lied to his manager, Belger, by telling Belger that he paid $1,800.00 for the coat, all in cash, and that he had no receipts—in order to get more money in settlement that he could have hoped to obtain by stating the actual, truthful purchase price and description (J. A. 152-154; 162-163; 236-237).[6] At that meeting Hansen was paid by the Company $1,370.00, in settlement of his claim. This sum was obtained by Hansen from the Company by means of

5. In view of Schachner's clear and convincing testimony that as a fur investigator he never inquires as to the "value" or "worth" of a garment, rather, only the cost and description in order to formulate his opinion, Hansen's testimony that Schachner asked him what the coat was "worth" and that he replied it was worth $1,800.00 is patently incredible (Tr. 402; 406).

6. Hansen's own sworn affidavit given to a Board agent affirms the lies when he said "Don [Belger] asked me what [was] the value or *price* on the coat and I told him $1,800.00." (J. A. 119).

Hansen's intentional misrepresentations (J. A. 155-156; 163; 237-238). Again the Board majority and Member Kennedy found that Hansen's testimony was "confused and inconclusive" and "equivocal and inconsistent" respectively; yet, only Member Kennedy recognizes the same confusion, equivocation and inconsistencies apparent in Hansen's Section 8(a)(1) testimony, which compel total reversal of the Law Judge's findings (J. A. 70).

On June 5, 1972 the Company recovered only $844.82 in subrogation proceedings against the department store which lost the fur coat (J. A. 205-207). The Company *then discovered for the first time that Hansen had paid only $844.82 for the coat, almost $1,000.00 less than he claimed he had paid and $500.00 less than Hansen received in settlement from the Company* based on his statements of price and description (J. A. 335; R. X. 5). Moreover, the Company, for the first time, discovered that the coat was a short one—not a mere expensive long coat as Hansen had fraudulently misrepresented (J. A. 62).

Because of the seriousness of the problem involving Hansen, a twelve year employee working in a fiduciary capacity to the Company as a claims adjuster, Hansen's claim file was investigated by a series of Company officials. The investigation confirmed that "Hansen had lied" regarding the purchase price of the coat and "therefore, was no longer to be considered a trusted employee." (J. A. 264-265; 335-337; R. X. 5, 6, 8). Approvals were thereafter obtained for Hansen's termination and on August 28, 1972 Hansen was discharged (J. A. 266).

2. The Alleged 8(a)(1) Conduct

The Administrative Law Judge found, and the Board summarily affirmed *without making any analysis of the record evidence or the Law Judge's credibility resolutions with respect to the alleged 8(a)(1) violations whatsoever*, that the Company engaged in conduct which amounted to coercive interrogations, threats of discharge, or other reprisals for joining or assisting the Union, and unlawfully creating the impression of surveil-

lance of employees concerted activities in violation of Section 8(a)(1) of the Act.

The Board's failure to discuss the conflicting evidence regarding the alleged 8(a)(1) violation in its Decision is particularly apparent in view of the penetrating analysis it undertook of the Law Judge's findings and conclusions with respect to the alleged 8(a)(3) violation and, its subsequent total rejection of the Law Judge's credibility findings and illogical weighing of the evidence used to support the alleged 8(a)(3) violation.

a. *Hansen's meeting with Fowler in June, 1972*

The Law Judge found that supervisor Fowler, in a conversation with Hansen on June 5, 1972, warned Hansen against supporting the Union, threatened Hansen with discharge for union activity and gave Hansen the impression of Company surveillance of union activities. In so finding, the Law Judge credited, without explanation, Hansen's conflicting and unsupported, self-serving testimony[7] as *the only evidence* of unlawful conduct at the same time completely disregarding all of Fowler's testimony

7. Hansen testified that he met Fowler in a diner on June 5, right after a union meeting (J. A. 105). Yet, in Hansen's own affidavit given to the Board agent he fixes this conversation as occurring after the June or July meeting (J. A. 139). Fowler on the other hand explicitly remembers the date of the meeting as June 21, 1972 and has a cancelled check to verify that date (J. A. 172-173). The date is important because were it not a date right after the June union meeting Hansen's version of the conversation would be implausible. Hansen testified that he told Fowler that he had come back from the meeting and that Fowler said "you know, the Company knows who is going to these meetings and as soon as the Union folds their tent everybody is going to be fired." (J. A. 105.) Obviously, if this conversation took place on June 21, sixteen days after the last union meeting as Fowler forthrightly testified, and the Law Judge provided no reason to disbelieve him, the entire tenor of Hansen's story is off on the wrong foot.

and discrediting Fowler without giving any stated reason therefor[8] (J. A. 22-23).

Fowler's credible testimony, which has never been discredited on an understandable basis by either the Law Judge or the Board, rationally explains just what occurred at the June 21 East Bay diner meeting between Fowler and Hansen. Hansen approached Fowler and asked Fowler what he thought about the Union. When Fowler replied that things seemed quiet,[9] Hansen then remarked that he received a great deal of literature from the Union at his home; he wondered how they got his address. Fowler explained that there were records at the office where this would not be a difficulty. "That was the extent of the conversation regarding unions." (J. A. 169-170.)

b. *Hansen's alleged meeting with Hicks on June 6, 1972*

At a purported chance meeting on June 6, 1972 in the Baldwin office, supervisor Hicks is alleged to have asked Hansen who was at the union meeting (on June 5) and then remarking "we know who was there." (J. A. 103-104.) Not only did Hicks categorically deny making any of these statements to Hansen on June 6, but, moreover, Hicks absolutely denied having *any* conversation with Hansen in 1972 regarding the Union[10] (J.

8. The Law Judge merely stated: "I do not credit Fowler's denial that he made this [alleged coercive] statement" without providing any reasons or the basis therefor (J. A. 22), and the Board majority inconsistently failed to analyze and disregard the Law Judge's findings as it had done so painstakingly in its 8(a)(3) portion; instead, erroneously, it "attach[ed] great weight" to 8(a)(1) findings (J. A. 58).

9. The union campaign, as Fowler reliably testified to, but which Hansen never mentioned in his testimony, was "quiet"; it was winding down from its inception in the fall of 1971 and shortly thereafter died out altogether (J. A. 170; 181).

10. Once again, the Law Judge routinely discredited a Company witness's denials without indicating specifically how she arrived at her crediting of Hansen and disbelieving Hicks: "I do not credit Hicks' denial that he had any conversation with

A. 163-164). Member Kennedy, because of Hansen's unreliable and inconsistent testimony compared to Hicks' forthright testimony, would alone believe Hicks' denials and disbelieve Hansen as the full Board did, but only *in the 8(a)(3) portion of its Decision.*[11]

c. *Hansen's meeting with Fowler and Lostella on July 27, 1972*

The Law Judge, consistent in her design credited Hansen's equivocal and inconsistent version of this July 27th meeting[12] and found that Fowler unlawfully interrogated Hansen by asking him if he planned to attend a forthcoming union meeting. The substantiality of the evidence discloses, however, that no

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Hansen involving the Union from April through December 1972, or that he made the inquiries and statements attributed to him." (J. A. 23.)

11. Thus, the Board credited the "clear and consistent testimony of . . . Hicks" that Hansen lied, telling Hicks he paid $1,800.00 for the coat, but then it inconsistently failed to examine and compare the rest of Hicks' forthright testimony on the 8(a)(1) allegation with that of Hansen who it had already disregarded in comparison with Hicks.

12. The Law Judge's crediting of Hansen flies in the face of the evidence which rationally calls for discrediting him in all respects. Hansen's version of this meeting is so fraught with inconsistencies and inaccuracies that it strains credulity. For example, Hansen testified that the three met by chance on June 21 (J. A. 106; 128-132) inside a diner (J. A. 106; 129); Hansen's testimony is vague and unreliable as demonstrated by his affidavit that he earlier stated it occurred around the end of June or early July; Hansen also said that he was working that day (J. A. 129); and that when they met, he was reading a union flyer (J. A. 106). Fowler and Lostella, on the other hand, were mutually corroborative in stating that the meeting was on July 27 (Tr. 170; 185; 193) in the parking lot of the diner (Tr. 170; 185); that Hansen was not reading a flyer but rather referred to a Union flyer which he had received which was in his car (J. A. 171; 185); and, that Hansen was on vacation, not working as he related (J. A. 171; 185). This fact is confirmed by Deaner who later that same day (July 27 not June 21), spoke with Hansen at home congratulating Hansen on his son's marriage (J. A. 193). Hansen's testimony is patently not to be believed.

such inquiry was ever made by Fowler of Hansen at that meeting or at any other time (J. A. 170-171).

d. *Hansen's telephone conversation with Deaner on July 27*

Deaner, Hansen's supervisor, testified that on July 27 he called Hansen who earlier that day had begun his vacation, to congratulate him on his son's forthcoming wedding (J. A. 193). Deaner also told Hansen that he had heard that Hansen saw Fowler and Lostella at Nathan's diner and, that Hansen mentioned that he had received a flyer from the Union. Deaner inquired as to why Hansen had not mentioned it to Deaner, and Hansen replied that he did not pick up his mail at home until after he had left work to begin his vacation (J. A. 193; 197).

In the face of Deaner's forthright testimony, the Law Judge once more chose, for no stated reason, to disbelieve a Company witness and, instead, credit Hansen's made-up version of the facts[13] to support an otherwise unsupportable conclusion that Deaner's telephone conversation amounted to unlawful interrogation, threats and an attempt to require Hansen to report on union meetings and activities, all in violation of Section 8(a)(1) (J. A. 24). The Board, once more, inconsistently failed to analyze Hansen's conflicting testimony or even compare it to that of Deaner which, if it had, would have compelled reversal of the Law Judge's findings.

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13. Hansen's own sworn affidavit given to the NLRB supports Deaner's version and belies and undermines Hansen's own testimony recited at the hearing. For example, nowhere in Hansen's affidavit is there any mention of Deaner's threat of a loss of Hansen's "plumb job" for supporting the Union, which the Law Judge nevertheless attributed to Deaner, apparently relying upon Hansen's oral testimony, certainly not his contradictory sworn affidavit given to the Board (J. A. 134; 135). Obviously, this is something Hansen would have told the Board investigator if it had been true.

ARGUMENT

I.

THE BOARD'S DECISION IS INTERNALLY INCONSISTENT BY FAILING TO CONCLUDE, OR EVEN CONSIDER, THAT THE EVIDENTIARY FACTORS WHICH CAUSED IT TO DISMISS THE SECTION 8(a)(3) PORTION OF THE COMPLAINT WERE PRECISELY THE SAME FACTORS THAT INFECTED THE SECTION 8(a)(1) FINDINGS AND THEREFORE COMPELS REVERSAL THEREOF

In this case, as Board Member Kennedy observed, "[t]he only evidence of the alleged 8(a)(1) violations is the uncorroborated testimony of Hansen . . . [whose] testimony was inconsistent and contradictory on several points" (J. A. 70) yet, whose testimony alone supports the Administrative Law Judge's unexplained and unsupportable findings. The Board majority conceded that Hansen's word was totally unreliable and woefully insufficient to support the Law Judge's findings of an 8(a)(3) violation and reversed that portion of the Law Judge's decision (J. A. 64); but the majority concluded, without explanation, that it "would not reverse [the Law Judge's] credibility resolutions" (J. A. 58) as to her 8(a)(1) findings even though they wholly rested upon the word of Hansen, an already proven liar, and required a disregard of the credible witnesses' testimony.

It is submitted that it was a dereliction of the Board's duty not to make the same analysis[14] with respect to the § 8(a)(1)

14. Thus, the Board found critical the Law Judge's omission and failure to note and discuss whole bodies of evidence contrary to Hansen's testimony, e.g., Schachner's unequivocal testimony, which the Board relied upon (J. A. 60-61) to discredit Hansen and reverse the Law Judge's 8(a)(3) findings. Yet, the Board then shirked its own responsibility and inconsistently failed to consider the testimony of Hicks, Fowler, Deaner and Lostella as to the 8(a)(1) allegations, which was also, critically, omitted from the Law Judge's Decision.

findings that it did with respect to the § 8(a)(3) issue, and that, had the Board discharged its responsibility in this regard, such analysis would have overwhelmingly compelled the Board to reject the Law Judge's § 8(a)(1) findings.[15] This case thus presents the important question of whether this Court may properly review a Board order which not only is founded upon totally unexplained § 8(a)(1) credibility resolutions which utterly fail to take cognizance of huge bodies of contrary evidence and, hence, fail to explain why that evidence is *not* credited,[16] but, in addition, contains an internal inconsistency

15. The Board's total reliance, for example, upon Hansen's testimony that Hicks interrogated him about attending union meetings cannot stand scrutiny when weighed against the following evidence which, unfortunately, was only considered by the Board in its 8(a)(3) analysis: (1) Hansen's minimal union activity of which the Company had no knowledge (J. A. 63) (2) Hansen's admitted statement that he was not a union proponent (J. A. 62-63) (3) Hansen's admission against interest that he only went to 2 union meetings (J. A. 122-124) (4) Hansen's conflicting testimony that he went to the April meeting after which Hicks interrogated him when, in fact, Hansen later admitted he did not go to that meeting (J. A. 124) (5) Hicks' "clear and convincing testimony" credited by the Board as to the 8(a)(3) (J. A. 61; 161-164) and (6) Hicks' credible testimony disregarded by the Law Judge and Board that he *never* made any such inquiries or even talked about the Union with Hansen at any time during 1972 (J. A. 164). Similar inconsistencies in analysis between the 8(a)(3) and 8(a)(1) portions of the Board's Decision is plainly evident in 8(a)(1) allegation and demands reversal of the same.

16. Recognizing that this Court has often declined to review credibility findings of administrative law judges "unless on [their] face [they are] hopelessly incredible" (*N. L. R. B.* v. *Dinion Coil Co.*, 201 F. 2d 484, 490 (2d Cir. 1952)), or "unless [the court] can say that the corroboration of this lost [demeanor] evidence could not have been enough to satisfy any doubts raised by the words [credited]," *N. L. R. B.* v. *James Thompson & Co.*, 208 F. 2d 743, 746 (2d Cir. 1953), the Court is presented here with just such a case. Significantly, if there ever were a case where this Court must not display "self-abnegation" in judicial review of an administrative law judge's credibility

in having discredited similarly unexplained 8(a)(3) credibility resolutions in the face of comparable overwhelming contrary evidence.

A. The Board's Crediting, Without Explanation, of the Uncorroborated Testimony of an Untrustworthy and Interested Witness Which Was Discredited in Reversing the Law Judge's Section 8(a)(3) Findings, May Not Constitute Substantial Evidence on the Record as a Whole to Support the Board's Findings of Violations of the Act

Several circuits have proclaimed that meaningful judicial review properly includes review of credibility resolutions made by the Board, which may be rejected where "contrary to sound reason." *N. L. R. B.* v. *Florida Citrus Canners Cooperative*, 311 F. 2d 541 (5th Cir. 1963); *N. L. R. B.* v. *Elias Brothers Big Boy, Inc.*, 327 F. 2d 421 (6th Cir. 1964); *N. L. R. B.* v. *Audio Industries, Inc.*, 313 F. 2d 858 (7th Cir. 1963). Indeed, this is precisely what the U. S. Supreme Court exclaimed: there is no requirement "that the Examiner's findings be given more weight [by reviewing courts] than in reason and in the light of judicial experience they deserve." *Universal Camera Corporation* v. *N. L. R. B.*, 340 U. S. 474, 496 (1951).[17]

Thus, in *N. L. R. B.* v. *Plastic Products, Inc.*, 354 F. 2d 66, 69 (6th Cir. 1965), the Sixth Circuit held, in reviewing a trial examiner's credibility findings under circumstances com-

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resolutions, this is it, Cf. *N. L. R. B.* v. *Marcus Trucking Co.*, 286 F. 2d 583, 590 (2d Cir. 1961), especially here where, as Member Kennedy stated, "the credibility findings of the Administrative Law Judge are not supported by the relevant evidence. . . ." Instead, as already demonstrated, there are "serious inconsistencies and contradictions in Hansen's testimony which [the Law Judge] did credit," (J. A. 66), which cannot be permitted to sustain her 8(a)(1) findings, just as they were discredited by the Board in the 8(a)(3) portion of its Decision.

17. See also, *N. L. R. B.* v. *Florida Steel Corporation*, 308 F. 2d 931, 936 (5th Cir. 1962); *Great Lakes Carbon Corporation* v. *N. L. R. B.*, 425 F. 2d 26, 29 (7th Cir. 1970).

parable to those presented herein, that "the uncorroborated testimony of an untrustworthy and interested witness' credited by a Board trial examiner, "may be held under such facts and circumstances not to constitute substantial evidence on the record considered as a whole." A similar result was reached in *N. L. R. B.* v. *Smoky Mountain Stages, Inc.*, 447 F. 2d 925, 929 (4th Cir. 1971), where the Fourth Circuit held that while "[n]ormally it is for the Board to resolve matters of credibility," yet, "in light of [employee] Wells' persistence in resorting to lies and misrepresentations, it was patently arbitrary and capricious for the examiner and the Board to conclude that . . . Wells was an honest, believable witness.[18]

These same principles readily apply in the instant case. Review of the Administrative Law Judge's credibility determinations, clearly demonstrates that reliance upon the unsubstantiated and uncorroborated Section 8(a)(1) testimony of Hansen who testified falsely or, at least, evasively and contradictory on material issues is, "on its face . . . hopelessly incredible." *N. L. R. B.* v. *Dinion Coil Co., supra.*

Hansen's testimony throughout the hearing contained serious inconsistencies and contradictions regarding (1) his misrepresentations as to his fur coat claim (2) his *de minimus* role in the union campaign and (3) his unique, albeit, fabricated and fantasized position as the only subject of *all* the alleged 8(a)(1) conduct: all of which Hansen alone testified to and all of which

18. See also, *Farmers Cooperative Co.* v. *N. L. R. B.*, 208 F. 2d 295, 304 (8th Cir. 1953) where nine witnesses testified for the Company that the reason for discharge was proper. Only the alleged discriminatee testified that the discharge was for union motives. Both the examiner and Board believed the discharged employee and disbelieved the nine witnesses. The Eighth Circuit refused enforcement of the Board's Order finding that the discharged employee's "self-interest and bias were obvious." Here, too, Hansen's self-interest and bias is obvious and he is not to be believed over the Company's witnesses in any respect.

the Law Judge, and the Board in part, mysteriously[19] and unaccountably chose to believe. Several cogent record examples illuminate just what a prevaricator Hansen is and why this Court cannot affirm the Board's Order which precariously rests upon Hansen's fabrications.

For example, with respect to the discharge, the Administrative Law Judge astoundingly believed Hansen's testimony that "he did not in filing or pressing his claim speak in terms of what he paid for the coat" (J. A. 32), and, rejected, out of hand, five company witnesses' testimony to the contrary.[20] The Board, critically observing that Hansen's own sworn affidavit contradicted his testimony at the hearing[21] held that "in light of Hansen's confused and inconclusive testimony" Hansen was not to be believed (J. A. 61). And in view of the "clear and consistent testimony" of the five Company witnesses, it is plainly evident that Hansen misrepresented the price of the coat (J. A. 61).

Hansen also lied or at least misreported and contradicted himself on the witness stand, in relating how he described the coat to Company representatives.[22] This led the Board to abandon the Law Judge's crediting of Hansen and find, instead,

19. This is mysterious because, as will be seen, *infra*, there is no stated basis for their belief and because the Board so painstakingly demonstrated in the 8(a)(3) portion of its decision just how Hansen's testimony when compared to the Company witnesses does not stand up to scrutiny and is not worthy of belief, because Hansen equivocated, evaded and contradicted himself while on the witness stand.

20. Office manager Belger (J. A. 237), supervisors Kane (J. A. 153-155) and Hicks (J. A. 162-163), employee Cramer (J. A. 140-141) and independent fur investigator Schachner (J. A. 145) all unequivocally testified that in conversations with Hansen he told them he "paid $1,800.00" for the lost or stolen fur coat or that the coat "cost $1,800.00," when he actually paid only $844.82.

21. See n. 20 *supra*.

22. See n. 6 *supra*.

that Hansen's attempted cover-up on the witness stand of his fur coat scheme would not prevent the Board from concluding that Hansen "further misrepresented the nature of the garment." (J. A. 62.)

Hansen's attempts on the witness stand to bolster his stature as a staunch union adherent did little more than show to what lengths he would go to perjure himself.[23] Hansen's own affidavit states: "I played no leadership role nor was I a particular advocate for or against the Union." (J. A. 122.) Yet, nowhere does the Administrative Law Judge even evaluate this critical admission against interest much less use it as probative evidence, as does the Board (J. A. 62-63), of Hansen's miniscule role in the union campaign and to discredit Hansen's testimony. In sum, the record evidence is replete with instances where Hansen's testimony is contradictory, evasive and simply untruthful. There is absolutely no rational basis to believe Hansen in any respect especially where reinstatement and back pay—Hansen's self preservation—were at stake.

Thus, the Board's discrediting of Hansen on the one hand with respect to the Administrative Law Judge's 8(a)(3) findings" while simultaneously "attach[ing] great weight to the credibitily findings" on the 8(a)(1) violations which also rest solely upon Hansen's proven-to-be untruthful testimony, which is, "on its face hopelessly incredible", is, we contend, internally inconsistent. *N. L. R. B.* v. *Dinion Coil Co., supra.* The Board cannot, consistent with its own Decision, "make an honest

23. While Hansen initially testified that he went to union preorganizing meetings in 1971 and four union meetings in 1972, he later admitted that his testimony was incorrect. Actually, the substantial evidence ignored by the Law Judge, including Hansen's own affidavit and admissions on cross-examination (J. A. 123; 124-125), and the testimony of General Counsel's own witness, Quinn (J. A. 84), undeniably proves that Hansen never attended any of the three preorganizing union meetings, went to only two of four open union meetings in 1972 and, at those two meetings, Hansen spoke up no more than other employees (J. A. 86).

witness of [Hansen in the 8(a)(1) testimony] who was so thoroughly discredited and who so tenaciously disregarded his sworn duty and obligation to testify truthfully [in the 8(a)(3) testimony]." *N. L. R. B.* v. *Smoky Mountain Stages, Inc., supra.*

B. The Law Judge's Reliance Upon Selected Portions of Inherently Infirm Evidence and Concomitant Disregard of Whole Bodies of Evidence Directly Contrary Thereto to Support Her Unsupportable Findings and Conclusions Is Erroneous as a Matter of Law

According to the Supreme Court's landmark decision in *Universal Camera Corp.* v. *N. L. R. B., supra,* the "substantiality of the evidence must take into account whatever in the record fairly detracts from its weight."[24] Yet, this is precisely what the Administrative Law Judge herein failed to do. Instead, the Law Judge "[blew] up bits and pieces [of inherently infirm record evidence] to arrive at a conclusion not justified by a *fair* reading of the record as a whole." *N. L. R. B.* v. *General Stencils, Inc.,* 472 F. 2d 170, 175 (2d Cir. 1972).

The Board reversed the Law Judge's 8(a)(3) findings in large part because her decision failed to take into account whole bodies of the Company's evidence.[25] But, the Board then illogi-

24. See also *Winn-Dixie Stores* v. *N. L. R. B.,* 448 F. 2d 8, 11 (4th Cir. 1971); *N. L. R. B.* v. *General Stencils, Inc.,* 472 F. 2d 170 (2d Cir. 1972).

25. The Law Judge not only discredited, without reason, Company witnesses but even more critically "erred in ignoring [their] testimony which was largely uncontraverted [by credible evidence] in any material respects." *N. L. R. B.* v. *Audio Industries, Inc.,* 313 F. 2d 858, 863-864 (7th Cir., 1963). For example, the Law Judge makes no mention of Fowler's entire testimony regarding his June meeting with Hansen (J. A. 22-23). Similarly, Hicks' clear testimony refuting Hansen's claims of unlawful coercion is completely disregarded in the Law Judge's decision (J. A. 23). The Law Judge also selects bits and pieces of Hansen's testimony, disregarding entirely, Hansen's conflicting and contradictory testimony to support her

cally failed to apply this same analysis to the findings of 8(a)(1), even though the 8(a)(1) evidence was subject to the same infirmities as the 8(a)(3) evidence. Such an analysis, appropriate by all standards of judicial review, would have compelled the Board's reversal of the findings of § 8(a)(1) violations.

Upon all of the following: the internal inconsistency of the Board's §§ 8(a)(3) and 8(a)(1) determinations; the proven incredibility of Hansen's testimony; the use of selected portions of unreliable evidence to support unsupportable findings; the ignoring of large portions of material, relevant evidence which fairly detracts from those findings; the only conclusion which this Court may reach is that the evidence in this case is clearly insufficient to support the Board's Order. ***Universal Camera Corp.*** v. *N. L. R. B., supra.*

II.

THE BOARD'S DECISION FAILS TO ARTICULATE REASONS FOR ITS ORDER IN CONTRAVENTION OF THE ADMINISTRATIVE PROCEDURE ACT AND THUS PRECLUDES JUDICIAL REVIEW

It is axiomatic that the National Labor Relations Board is bound by the provisions of the Administrative Procedure Act (hereinafter referred to as "the A. P. A.") (*N. L. R. B.* v. *Metropolitan Insurance Company*, 380 U. S. 438, 442-443 (1965)), which provides, *inter alia*, that:

> "All decisions . . . are a part of the record and shall include a statement of—(A) findings and conclusions, *and the reasons or basis therefor*, on all the material issues of fact, law or discretion presented on the record. . . ." 5 U. S. C. § 557 (1964) (emphasis supplied.)

8(a)(1) conclusions. See also, nn. 7, 12, 13, *supra*. As Member Kennedy so correctly points out, [the Administrative Law Judge cannot discredit the testimony of . . . [Company] witnesses on [these] critical issue[s] by giving it the silent treatment." (J. A. 68.) Yet, that is precisely what the Law Judge and Board did here.

The Supreme Court has enunciated a "simple but fundamental rule of administrative law" that "the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." *S. E. C.* v. *Chenery Corporation*, 318 U. S. 80, 94 (1943). In the ordinary case, adherence to the A. P. A. is necessary to provide the reviewing court with a statement of reasons in order that the court may better understand what it is reviewing.

This case is not simply, however, the ordinary case. Here the Board reversed the Administrative Law Judge's Decision that Hansen's discharge was violative of Section 8(a)(3) because it was based solely on Hansen's testimony and Hansen's section 8(a)(3) testimony was incredible and fully discredited by the testimony of the Company's witnesses. Yet, unaccountably, the Board elected to credit the same Hansen's equally unsupported Section 8(a)(1) testimony in the face of overwhelming adverse testimony of Company witnesses.[26] The Law Judge gave no more reason for crediting Hansen's testimony and finding violations of § 8(a)(1) than she did of crediting Hansen and finding a violation of § 8(a)(3) which has now been reversed by the Board. The Board similarly disregarded whole bodies of record evidence directly contrary to its findings and conclusions, also without providing any "reasons or basis" for its decision.

Patently the Administrative Law Judge and Board Decisions, both, wholly fail to comply with the administrative standards of acceptable decision writing required by the A. P. A. Such administrative irresponsibility cannot be sanctioned by this Court or "judicial review will become a sham." *Old Colony Bondholders* v. *New York, N. H. & H. R. Co.*, 161 F. 2d 413, 451 (2d Cir. 1946) (Judge Frank, dissenting), *cert. den.*, 331 U. S. 859 (1947). See *N. L. R. B.* v. *General Stencils*, 438 F. 2d 894, 905 n. 13 (2d Cir. 1971).

Member Kennedy correctly stated that the failure of the Administrative Law Judge herein to "indicate carefully and

26. See n. 25 *supra*.

specifically how [she] arrive[d] at [her] credibility resolutions . . . requires rejection of [those] conclusions." (J. A. 66.)

Nowhere in the Law Judge's intermediate Decision (or in the Board Decision) as to Section 8(a)(1) having been violated are reasons given for crediting Hansen's testimony on all critical points, though Hansen proved himself throughout the hearing to be incredible, inconsistent, a fantasizer of fact who is patently, not to be believed as the Board implicitly found in connection with his testimony in the 8(a)(3) allegation (J. A. 59-64). Similarly, nowhere in her Decision does the Law Judge give reasons for not crediting fully the § 8(a)(1) testimony of Fowler, Hicks, Lostella and Deaner, who testified forthrightly, were mutually corroborative and demonstrated their candor at the hearing. The Law Judge's generalized credibility findings like: "I do not credit Fowler's denial . . ." or, "I do not credit Hicks' denial . . ." or, "I credit Hansen . . ." or, "I credit Hansen's version of this conversation", as to alleged unlawful 8(a)(1) activity (J. A. 22-24), all condemned as a "bad practice" by the Board[27] and the Courts,[28] manifestly warrants reversal of her conclusions and findings on the issues in the case.

Moreover, the Board majority's § 8(a)(1) pronouncement that it attaches "great weight to the credibility findings of the Administrative Law Judge who had the opportunity to observe

27. See *M & S Company, Inc.*, 108 NLRB 1193, where the Board condemned the use of generalized blanket findings relating to credibility as a *bad practice* by Administrative Law Judges inasmuch as the Board must normally place heavy reliance on their evaluation of truth or falsity of testimony. The Board stated that such practices may well constitute sufficient basis for rejecting her conclusions as to credibility and her findings on the issues in the case. Member Kennedy relies upon *M & S* to discard the Law Judge's credibility resolutions in their entirety.

28. *NLRB* v. *General Stencils, Inc.*, 438 F. 2d 894, 904-905 (2d Cir. 1971); *NLRB* v. *Kostel*, 440 F. 2d 347, 352 (7th Cir. 1971); *Atchison, Topeka and Santa Fe R. R. Co.* v. *Wichita Board of Trade*, ... U. S. ....., 41 U. S. L. W. 4905, 4911 (1973).

and judge the witnesses as they testified" (J. A. 58)[29] fails to cure this inherent defect in the Law Judge's Decision. It is clear that "this [kind of] conclusory statement, standing alone, does not satisfy Section 557 of the A. P. A." *Auto Workers (Udylite Corp.)* v. *N. L. R. B.*, 455 F. 2d 1357, 1369 (D. C. Cir. 1971). And, patently, it is this kind of "substitution of a conclusion for explanation [which] does not permit a reviewing court to do its job." *Peerless of America, Inc.* v. *N. L. R. B.*, 484 F. 2d 1108, 1119 (7th Cir. 1973); *The Atchison, Topeka and Santa Fe R. R. Co.* v. *The Wichita Board of Trade*, ... U. S. ....., 41 L. W. 4905, 4911 (1973).

Thus, in order to prevent this kind of "capricious" administrative arbitrariness (*N. L. R. B.* v. *General Stencils, Inc., supra*), this Court should set aside the Board's Order solely based upon the Law Judge's unstated, unsupported and, as demonstrated *infra*, "incredible" credibility findings.

III.

NO SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE EXISTS TO SUPPORT ANY OF THE BOARD'S FINDINGS OF UNLAWFUL ACTIVITY

Assuming, arguendo, that the Law Judge's and Board's Decision and Order is not internally inconsistent, otherwise defective or violative of the Administrative Procedure Act, which it

29. This statement is meaningless. Indeed the reader and this Court can only speculate as to what or how the Law Judge observed and judged the witnesses as they testified, as there is absolutely nothing in the Law Judge's Decision to indicate that his credibility findings rest upon such demeanor evidence or anything else. "Courts ought not to have to speculate as to the basis for an administrative agency's conclusion." *Northeast Airlines, Inc.* v. *C. A. B.*, 331 F. 2d 579, 586 (1st Cir. 1964). It is this very type of "lack of clarity in the administrative process [which] infects review with guesswork. See *Phelps Dodge Corporation* v. *N. L. R. B.*, 313 U. S. 177, 197 (1941); *Teamsters, Local 171 (Overnite Transportation Co.)* v. *N. L. R. B.*, 425 F. 2d 157 (4th Cir. 1970).

clearly is, in any event there is still a lack of substantial evidence on the record as a whole to support any of the individual 8(a)(1) findings.

A. There Was No Unlawful Coercion of Hansen by Fowler on June 5, 1972

The Law Judge found that supervisor Fowler acted unlawfully when on June 5, 1972 he happened to meet Hansen in the East Bay Diner and informed Hansen "you know, the Company knows who is going to those meetings and as soon as the Union folds their tent everybody is going to be fired." (J. A. 105.) The Law Judge's conclusions that Fowler violated Section 8(a)(1) by giving Hansen the impression of surveillance,[30] warning Hansen against supporting the Union and threatening Hansen with retaliation by discharge for engaging in union activity (J. A. 23) has no rational basis. Incredibly, Fowler, admittedly at that time a supervisor in another office, who meets Hansen by pure happenstance[31] allegedly threatened Hansen. There is no evidence in the record that Fowler knew Hansen to be a union proponent which, in fact, he was not.[32] And there is no evidence that Fowler saw or talked to Hansen before that

30. Even assuming, *arguendo*, that Fowler told Hansen that the Company knew who was attending union meetings, this, by itself, would not be enough to constitute an impression of surveillance. Here there is absent the "willful conduct and a justifiable impression" of surveillance which tends to interfere or inhibit an employee's future union activities. Cf. *NLRB* v. *Simplex Time Recorder Co.*, 401 F. 2d 547 (1st Cir. 1968), because there is no evidence that Hansen, or any other employee was inhibited in any of their activities on behalf of the Union.

31. The date patently *was* June 21, 16 days after the last union meeting, not, as Hansen fantasizes, June 5, 1972 (J. A. 169; 172-173).

32. See Hansen's affidavit (J. A. 121-122) that he was not an advocate for or against the Union. See also the Board's Decision where it expressed serious doubt that the Company even had knowledge of Hansen's admittedly "minimal union activity." (J. A. 63.)

chance meeting on June 21. And, significantly, there is no evidence that Fowler allegedly threatened any other employee about their activities.

Regarding the conversation, Hansen and Fowler met by chance inside the restaurant on June 21. Significantly, Hansen, not Fowler, admittedly initiated and pursued the topic of union and union meetings (J. A. 105; 129-132). Hansen's testimony moreover, is substantially less believable than Fowler's testimony that his only reference to the Union in that conversation, and then only in answer to Hansen's inquiries concerning the Union, was that the campaign was quiet and the union probably got his address from records in the office (J. A. 169-170; 181).

Furthermore, Fowler as well as all other supervisors, were instructed to allow employees to pursue their interests in the Union without interrogation, threats, promises or surveillance (J. A. 307). In view of that direction, plus Hansen's voluntarily striking up a conversation as he did with Fowler, in a social context outside of their offices,[33] the evidence does not support, in these circumstances, any finding of illegal coercion.

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33. The Board held in *Tomco Studs Co., Inc.*, 170 NLRB 428, that in a social conversation engaged in by employees and supervisors outside their office in a restaurant-tavern, where the supervisors interrogated the employees about the Union, there was nothing unlawful or coercive 8(a)(1). Due to the nature of the discussion, the social character and the location of the event, the Board found in that case no actionable violation. Similarly, Fowler's meeting with Hansen was unplanned, informal, social in nature and actually uncoercive in effect. This Court's own standards used to test the legality of interrogations (see n. 34, *infra*) when applied here, calls for no other conclusion but that even if Fowler had made such statements they were perfectly legitimate. See *Bourne* v. *N. L. R. B.*, 332 F. 2d 47, 48 (2d Cir. 1964).

B. Similarly, There Was No Unlawful Interrogation of Hansen by Hicks, Fowler or Deaner

The majority of the Board's 8(a)(1) findings involve asserted unlawful interrogation. There are three specific incidents at issue: (1) a Hicks inquiry of Hansen, admittedly in the middle of an aisle in the office, as to who attends union meetings (J. A. 23); (2) a Fowler inquiry of Hansen, in an admittedly friendly context outside of a restaurant, as to whether Hansen was going to attend a union meeting (J. A. 24); and (3) a Deaner inquiry of Hansen over the telephone during a call admittedly "on a matter of personal good will", as to why Hansen had not told Deaner and instead told Fowler, a supervisor of another office, that he had received a union flyer (J. A. 24).

This Court has repeatedly indicated that an employer has a right to interrogate employees providing the interrogation is not accompanied by explicit threats and coercion.[34] Thus, in *Bourne* v. *N. L. R. B.*, 332 F. 2d 47 (2d Cir. 1964), this Court set aside a Board finding of interrogation, where supervisors asked employees, *inter alia*, as to "how the Union [was] doing", and whether employees "were for the Union" or knew anything about the Union or, had been approached by the Union, on the basis that these inquiries failed to meet the "severe standards" required for findings of unfair labor practices.[35] In the instant case, as in *Bourne*, the interrogations

34. Only the Deaner conversation with Hansen was found to have involved a threat, and this finding, for the reasons discussed *Infra* is erroneous.

35. These standards enunciated by this Court include:

"(1) The background, i.e. is there a history of employer hostility and discrimination?

(2) The nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individual employees?

were lawful; there was *no* evidence of a pattern of anti-union hostility shown; the information sought was of a general nature; the questions were asked by low-ranking supervisors; and, the entire tenor of the conversation was of a friendly, non-coercive nature.[36]

Similarly, in *N. L. R. B.* v. *A & S Electronic Die Corporation*, 423 F. 2d 218, 220 (2d Cir. 1970), *cert. den.*, 400 U. S. 833 (1970), where the employer polled his employees whether they desired union representation, this Court held that where "there are no indications that [the employer] threatened [its employees] or in any way attempted to lure them away from the Union . . . so as to inhibit the employees organizational activities", there is no violation.[37]

Thus, Hansen testified that Hicks asked Hansen, "who attends union meetings," after union meetings in April, May and June, 1972. Surely, since Hansen testified he continued to go to the May and June meetings[38] he was, patently, neither

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(3) The identity of the questioner, i.e. how high was he in the company hierarchy?

(4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of unnatural formality?

(5) Truthfulness of the reply". 332 F. 2d 47, 48.

Patently, the purported questioning of Hansen by Fowler, Hicks and Deaner fails to "meet [any of] the standards set out", cf. *N. L. R. B.* v. *Milco, Inc.*, 388 F. 2d 133, 137-138 (2d Cir. 1968), and moreover, is wholly unsupported by substantial record evidence.

36. Accord, *N. L. R. B.* v. *Firedoor Corp.*, 291 F. 2d 328 (2d Cir. 1960), *cert. den.*, 368 U. S. 921 (1961); *N. L. R. B.* v. *Syracuse Color Press, Inc.*, 209 F. 2d 596 (2d Cir. 1953), *cert. den.*, 347 U. S. 966 (1954); *N. L. R. B.* v. *Montgomery Ward & Co.*, 192 F. 2d 160 (2d Cir. 1951).

37. Cf. *N. L. R. B.* v. *Milco, Inc.*, 388 F. 2d 133, 137, 138 (2d Cir. 1968).

38. Hansen admitted that he did not go to the April, 1972 meeting because it fell on his birthday (J. A. 124). Thus, his testimony is again highly suspect as probative evidence.

inhibited nor affected in any fashion by Hicks' inquiry.[39] Similarly, Fowler's isolated and innocuous inquiry "are you going to the meeting" on July 27 *in response to Hansen's volunteering that he received a union flyer* was also non-coercive under the *Bourne* rationale. Indeed, Hansen testified that after Fowler made that statement they "shook hands" with one another in a friendly parting gesture (J. A. 130).

C. There Was No Other Unlawful Coercion of Hansen

The Law Judge found that Deaner's single telephonic inquiry of Hansen on July 27, 1972 as to why he had told Fowler, the supervisor in another office, rather than Deaner about receiving a union flyer constituted unlawful conduct. Specifically, the Law Judge found that the Company "attempted to require employees to report on union meetings . . . and threatened to change his job assignment in retaliation for his union activities. . . ." (J. A. 24.)

In the first instance, once again, the entire foundation for the Law Judge's unsubstantiated findings is formed from Hansen's proven to be unreliable and contradictory testimony.[40] Second, as the facts plainly reveal, *supra*, p. 13, Deaner's social telephone conversation with Hansen contained neither express nor implied threats of loss of benefit. The only substantial evidence presented in the record is that Deaner's single, innocuous inquiry of Hansen during this conversation was made

39. Nothing in the record evidence supports the Law Judge's irrational finding that Hicks' inquiry and statement "we know who attends" also gave Hansen the impression of surveillance by the Company. Moreover, the record discloses that Hansen was not in any way inhibited in his activities after Hicks' purported statements to him. *N. L. R. B.* v. *Simplex Time Recorder Co., Inc., supra.*

40. Hansen's own sworn affidavit fails to mention Deaner's alleged threat of loss of a "plumb" job, see n. 13, *supra;* compare Hansen's affidavit with Hansen's contradictory and evasive testimony (J. A. 133-135), and, then contrast that with Deaner's frank and forthright testimony (J. A. 193), that no such threat was ever made.

in order to remind Hansen that Deaner, not Fowler, was his supervisor (J. A. 193, 201).[41]

Placed in its proper context, including the social friendly nature of the conversation, the innocuous nature of the inquiry and the truthful response it engendered,[42] there was no coercive effect. *N. L. R. B.* v. *M. H. Brown*, 441 F. 2d 839, 841 (2d Cir. 1971).

The Law Judge's findings, in short, rest on little more than "suspicion, surmise, implication [and] plainly incredible evidence" held impermissible in *Universal Camera Corp.* v. *N. L. R. B., supra*, at 484. See also, *N. L. R. B.* v. *Columbian Enameling and Stamping Co.*, 306 U. S. 292, 300 (1939).

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41. Hansen, himself, considered Deaner's question as merely a simple inquiry as to why Hansen, "had not told Deaner [his supervisor] about the Union meeting when [he] had *instead* told Fowler, the manager of another office." (J. A. 133.) See *Bourne* v. *N. L. R. B., supra*, at 48.

42. Hansen stated that he had not as yet received his mail containing the flyer when he was in the office with Deaner earlier that day and, could not, therefore, have mentioned it to Deaner at that time since he did not know about it until later (J. A. 193).

IV.

CONCLUSION

For all of the foregoing reasons, the Company contends that the Order of the Board should be set aside and denied enforcement.

Respectfully submitted,

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STATE OF ILLINOIS, }
COUNTY OF COOK. } ss. M. A. Kasnick being first duly

sworn, deposes and says that he served two copies of the Brief
and two copies of the Joint Appendix
in the above entitled cause, as per statute herein made and provided, on

Mr. Elliott Moore
Deputy Associate General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D. C. 20570

this 21st day of June, A. D. 1974

M. A. Kasnick

Subscribed and sworn to before me this 21st
day of June, A. D. 1974

Leonard S. Kinstrom
Notary Public.

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